2003 WL 24891621 (N.M. Dist.) (Trial Motion, Memorandum and Affidavit)
District Court of New Mexico.
Bernalillo County

Frank OVERSON and Ila OVERSON, as Co-Personal Representatives of the Estate of Ray E. Overson, Plaintiffs,
v.
FOUR SEASONS NURSING CENTERS, INC., New Manorcare
Health Services, Inc., Manorcare, Inc., and Craig Shaffer, Defendants.

No. CV 2001-08253.
January 24, 2003.

Plaintiff's Memorandum Response to Defendants' Motion for an Order Restricting Publicity and for Survey of Potential Jurors at Plaintiffs' or Their Counsels' Expense

COME NOW Plaintiff's, by and through their attorneys, Dines, Gross & Esquivel, P.C. (Michael A. Gross), and Shapiro and Bettinger, P.C. (Carl Bettinger), and hereby respond to the Defendants' Motion for an Order Restricting Publicity and for Survey of Potential Jurors at Plaintiffs' or Their Counsel's Expense as follows.

I

INTRODUCTION

The Motion at issue represents an attempt by a multi-billion dollar corporation [1] to force a widow living on $892 a month in social security (see attached Exhibit “A”) to pay for an expensive jury survey. Counsel for this multi-billion dollar company knows that this punitive Motion does not even come close to raising the facts necessary to support the relief sought.

The Motion at issue is based upon a single isolated newspaper article, which was a side-bar to the main article on the subject of the failure of legal protections for the elderly. The article references this case, not surprisingly, as an example of failures in the system.

This multi-billion dollar corporation has filed a Motion seeking to punish the Plaintiff for providing information that is already a matter of public record. This lawsuit, in the first instance, is a public matter. Secondly, there have been public arguments before this Court about prior lawsuits against the company, and, more pointedly, regarding the fall prevention policy that was discussed in the newspaper article. See attached Exhibit “B.” Defendants cry foul because this fall prevention policy was a term of a confidential settlement, yet this very policy was the subject of public legal argument before this Court without objection by defense counsel just over a month ago.

The fact of the matter is that abuse and neglect of the elderly has been the subject of widespread nationwide media commentary. See, e.g., Exhibit “C.” If one isolated article about this lawsuit has poisoned the jury pool, then not one such lawsuit of the thousands throughout the country could be held in the original venue.

These multi-billion Defendants would seek to intimidate the Plaintiff and her counsel through this frivolous Motion just as they sought to silence an **elder abuse** advocate in Pennsylvania by suing her for defamation. See Exhibit “D.” ManorCare later

voluntarily agreed to dismiss that lawsuit. See Exhibit "E." The Defendants through the instant Motion seek to hide their bad acts and multiple prior lawsuits in the secrecy of darkness because the company cannot stand the light of truth.

The Defendants' Motion raises not one scintilla of evidence that would indicate that the jury pool in this case has been poisoned by the single isolated news article. Instead of carrying their own legal burden, the Defendants seek to shift to the Plaintiff the financial burden of gathering the Defendants' own evidence! Surely, this multi-billion dollar corporation can afford a jury survey if it can afford to spend millions on lobbying and advertising in an effort to influence the very jurors whom they argue have been poisoned by this single article. If the shoe fits both feet, would the Defendants agree to cease all marketing efforts during this litigation? Probably not.

However, as demonstrated herein, the Defendants have not even come close to presenting this Court with sufficient evidence demonstrating a substantial likelihood of prejudice or a clear and present danger to a fair and impartial trial and on that basis the Motion should be denied.

II

ARGUMENT

The New Mexico Supreme court in *Twohig v. Blackmer*, 1996-NMSC-023, 121 N.M. 746, 918 P.2d 332, held that gag orders are presumptively unconstitutional. Nevertheless, to overcome this presumption and to justify a gag order, the trial court must make specific findings demonstrating a substantial likelihood of prejudice or a clear and present danger to a fair and impartial trial. 1996-NMSC-023, *26. The Court in *Twohig* further indicated that judicial review of gag orders is fact-specific, and went to great lengths to provide a detailed review of the type of cases illustrating the grounds necessary to uphold or strike down gag orders. 121 N.M. 751-754. Most notably, the party seeking the prior restraint carries the burden to substantiate such an adverse measure. *State, ex rel. New Mexico Press Ass'n v. Kaufman*, 98 N.M. 261, 648 P.2d 300, (1982).

The *Twohig* case involved a criminal prosecution in which the defendant's Sixth Amendment right to a fair trial had to be weighed against First Amendment rights to speak about the proceedings. Courts in civil cases recognize that the rules that have been developed regarding prior restraints in the criminal context may be viewed as "too permissive toward prior restraints," that heavier burdens should apply to proponents of gag orders, and that such gag orders should be treated like any other prior restraint. *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992).

The New Mexico Supreme Court in *Twohig* relied upon the Texas Supreme Court opinion in the civil case of *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992). 1996-NMSC-023, * 13. The Court in *Davenport* held that: (1) a "gag order" prohibiting all discussion of the civil case outside the courtroom by a guardian ad litem violated the constitutional guarantee of free expression, and (2) that the order failed to identify any miscommunication that trial court may have perceived, did not indicate any specific comment imminent harm to the litigation, and offered no explanation of why such harm could not be sufficiently cured by remedial action.

The clear thrust of the *Twohig* court's review of the facts of numerous cases is that gag orders are only justified where there has been a convincing record made by the proponent of a gag order of "widespread publicity" *(Levine v. United States District Court*, 764 F.2d 590 (9th Cir. 1985), *cert denied*, 476 U.S. 1158 (1986)); a community "fully saturated" by publicity *(In re San Juan Star Co. (Soto v. Barcelo)*, 662 F.2d 108 (1st Cir. 1981); highly inflammatory comments to the news media by counsel urging a "scorched earth policy" and public marches on the courthouse (*United States v. Tijerina*, 412 F.2d 661 (10th Cir.), *cert denied*, 396 U.S. 990 (1969). Absent a record of such egregious fact, the New Mexico Supreme Court concluded that mere "possibilities" that jurors might be affected by extrajudicial statements are not sufficient to justify a gag order. *Kemner v. Monsanto Co.*, 492 N.E.2d 1327 (Ill. 1986).

The Defendants in the case at bar have utterly failed to present any evidence that rises to the level required by the New Mexico Supreme Court. The Defendants are simply grasping at straws. They have presented no hard evidence that the jury pool has in fact been poisoned by the single isolated news article at issue. The Defendants have made no showing of the type of pervasive, highly charged and prejudicial publicity surrounding this case. News media throughout the country - from television to newspapers to the internet - have been publicizing such abuse for years. Contrary to the Defendants' misleading arguments, the fact of **elder abuse** and neglect is no "secret" which has been revealed by the Plaintiff's through media contacts. It is common public knowledge.

The Defendants' Motion is not only a direct attempt to silence the Plaintiff's and their counsel but it is also a direct attempt to limit access by the media to the facts of this case. (The Defendants' Motion prays for an Order "restricting publicity.") It is particularly curious given the fact that Defendants' counsel is also counsel for the New Mexico Press Association.

The Defendants' request for a gag order also attempts to circumvent a key principle in *State ex rel. New Mexico Press Ass'n v. Kaufman*, 98 N.M. 261, 648 P.2d 300 (1982), which requires that before placing restrictions on the media, some minimum form of notice should be given to the media and a hearing held at which anyone present should be given the opportunity to object. Clearly, the New Mexico Constitution, Art. 1, § 17, prohibits the type of prior restraint being advocated by the Defendants. The Defendants have presented no evidence that statements by Plaintiff's counsel in a single isolated news article created the type of pervasive and prejudicial atmosphere that might run afoul of that provision.[2] Interestingly, numerous articles in *Twohig v. Blackmer* were not even enough for the New Mexico Supreme Court to substantiate a gag order. Here, we are dealing with one article on one day. Based on this fact alone, the attempts at this prior restraint appear to frivolous.

III

CONCLUSION

For the foregoing reasons, the Plaintiff prays that the Court enter its Order denying the Defendants' Motion for an Order Restricting Publicity and for Survey of Potential Jurors at Plaintiffs' or Their Counsel's Expense, ordering the Defendants to pay the Plaintiffs' reasonable attorneys fees and costs, and granting such other and further relief as the Court deems just and proper.

Footnotes

1 Manor Care, Inc.'s Annual Report for the fiscal year ended December 31, 2001, indicates that the company had annual revenues of $2,694,056,000. See: http:// www.sec.gov/Archives/edgar/data/878736/000095015202001843/193110ae10-k405.htm #013

2 The Defendants correctly point out that Rule 16-306, NMRA, is inapplicable because it only applies to criminal proceedings.

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